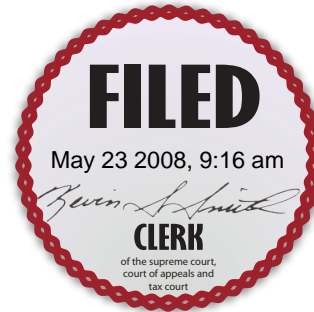


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

BRENT BAILEY,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 49A02-0712-CR-1020

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Lisa Borges, Judge
Cause No. 49F15-0611-FD-216603

May 23, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Brent Bailey (“Bailey”) was convicted in Marion Superior Court of Class D felony credit card fraud and Class D felony theft. He also pleaded guilty to being a habitual offender. He was sentenced to an aggregate term of three and one-half years in the Department of Correction. Upon appeal, Bailey claims that statements made by the State amounted to prosecutorial misconduct.

We affirm.

Facts and Procedural History

On November 10, 2006, Norma Martin stopped at a gas station in Speedway. She left her purse in her truck while she went into the convenience store. When she arrived at work, she noticed that her purse was missing. She returned to the gas station and notified police of the theft. The police arrived and took a report, yet waited to broadcast the theft over the radio.

Also that morning, other officers responded to a call about two suspicious individuals, one walking and one in a van. Upon asking the men for identification, the men identified themselves as Brent Bailey and Larry Gilliam (“Gilliam”). After receiving permission to search the van, the police found a purse with Martin’s information inside. After attempting to contact Martin, the police asked the men about the purse. They stated that the purse may have belonged to two women they had been with the night before. The officers let the men leave.

The police subsequently received notice of Martin’s stolen purse and drove to the motel where Bailey and Gilliam said they stayed. The police spoke with Gilliam, who told them where he had dropped off Bailey. The police then transported Gilliam to the

rear of a gas station near a shopping center where they located Bailey. The police took Bailey and Gilliam into custody and one of the officers walked over to the Fashion Bug to confirm that Bailey had been in the store and attempted to make a purchase. The officer later found Martin's purse, identification, and other items belonging to her in a dumpster behind the gas station.

A detective arrived and began an investigation of the crime. After the detective spoke with the other officers and observed Bailey and Gilliam, he went to the Fashion Bug store. The Fashion Bug manager identified Bailey as the man who attempted to use the credit card. The detective searched the area and found Martin's driver's license and two Fashion Bug credit cards issued to Martin in a trashcan near the Fashion Bug store.

On November 14, 2006, Bailey was charged with Class D felony attempted credit card fraud and Class D felony theft. The State later added a habitual offender count. On September 17, 2007, a jury trial began at which Bailey testified. During the trial, the State cross-examined Bailey regarding his criminal history. After the conclusion of the trial, Bailey was convicted on all counts. He then pleaded guilty to the habitual offender charge. On October 19, 2007, the trial court sentenced Bailey to an aggregate sentence of three and one-half years in the Department of Correction.

Discussion and Decision

Bailey argues that the State committed prosecutorial misconduct when it overstated his criminal history in its closing statement. To preserve an issue regarding the closing argument, Bailey should have contemporaneously objected to the statement and requested an admonishment. "Failure to request an admonishment results in a waiver

of the issue for appellate review.” Flowers v. State, 738 N.E.2d 1051,1058 (Ind. 2000). Bailey concedes that he did not object to the prosecutor’s statements or seek an admonishment, therefore, he waived this issue for appellate review.

However, Bailey attempts to avoid this waiver by claiming that the statement was fundamental error. Prosecutorial misconduct may constitute fundamental error, but the misconduct must be so prejudicial to the defendant’s rights as to make a fair trial impossible. Gasper v. State, 833 N.E.2d 1036, 1042 (Ind. Ct. App. 2005), trans. denied.

During the State’s closing argument, the prosecutor said:

Does [Bailey] have a reason to tell you a story today that’s not true? Yes absolutely [C]onviction after conviction after conviction after conviction after conviction of D Felony and C Felony crimes of urging [sic] from theft to auto theft to robbery as a C felony. This is someone who is dishonest. This person is not credible. This person is not going to get up there and tell you the truth. He can get up there and act like he’s telling the truth but he’s not giving you the truth and I hope you don’t believe it.

Tr. p. 211. By our count, the above offending statement referred to six convictions for D felonies and C felonies. Upon review of the Pre-sentence Investigation Report (“PSI”), we would note that Bailey did indeed accumulate six felonies, one Class D felony auto theft, two Class D felony thefts, one fifth degree felony theft from Ohio, and two C felony thefts. PSI pp. 4-6. The State may have been inadvertently accurate about Bailey’s criminal history, but the State did not mislead the jury. Additionally, the State presented overwhelming evidence that supported Bailey’s convictions. Based on the facts and circumstances before us, we conclude that no fundamental error occurred.

Affirmed.

MAY, J., and VAIDIK, J., concur.